

Hon. Ronald J.H. O’Leary
Cleveland Municipal Housing Court
The Justice Center, Courtroom 13-B
1200 Ontario Street
Cleveland, OH 44113

Re: Proposed Housing Court Rule 6.13 “Motion to Seal Eviction Record”

Dear Judge O’Leary:

Thank you for inviting the First Amendment, Media & Entertainment-Law Practicum (“FAME”) to provide comments on the Court’s draft rule for sealing judicial records (the “Proposed Rule”). By incorporating First Amendment requirements, this rulemaking serves tenants and the larger public alike, and represents a vital step in solving the eviction crisis. With modest suggestions we explain below, we fully support the Proposed Rule.

The private interests at stake are considerable, and held by individuals who often lack counsel. But public access to Housing Court records also serves their interests, and those of *all* tenants, by driving public and policy attention to their plights. This Court’s records are necessary to solve our most pressing civic problems: urban blight, endemic vacancies, corporate malfeasance, public corruption, and housing discrimination. They harm our most vulnerable citizens, and experts agree that inadequate access to court records is a chief obstacle to solving them.¹ The Proposed Rule therefore represents a vital opportunity to protect *all* tenants from harm; to prevent treating symptoms in particular cases from thwarting lasting cures.

The First Amendment resolves this tension by requiring state-court sealing practices to meet strict standards, preventing parties from unduly “limiting the stock of information from which members of the public may draw.”² But however mandatory its protections, the public’s right of access is always vulnerable, for it is never directly represented in court, and cannot enforce itself. Historically, the public’s rights were asserted by newspapers as its surrogates,³ but those efforts were always incomplete, and all but vanished with the recent crisis in local reporting.⁴

This is why the First Amendment requires courts to protect the public’s right of access.⁵

¹ See Memorandum, *infra*; see also Desmond, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016).

² *Richmond Newspapers v. Virginia*, 448 U.S. 555, 575 (1980) (plurality op. of Burger, C.J.); see also *id.*, 488 U.S. at 587 (Brennan, J., concurring) (explaining the First Amendment’s “structural” role in democratic self-government: “Implicit in this structural role is not only the principle that debate on public issues should be uninhibited, robust, and wide-open, but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed.”) (citations and quotations omitted)).

³ *CNS v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014) (“The news media, when asserting the right of access, are surrogates for the public. The free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press.”) (cleaned up; citations and quotations omitted).

⁴ RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557 (2011).

⁵ See, e.g., *Citizens First Nat’l Bank v. Cincinnati Ins.*, 178 F.3d 943, 945 (7th Cir. 1999) (“The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it)”).

Every judicial rulemaking shares a common premise: that categorical rules are needed to protect interests that may be overlooked in case-by-case adjudication. This premise is fundamental to the Proposed Rule, for “where the rights of the litigants come into conflict with the rights of the media and public at large, the trial court’s responsibilities are heightened.”⁶

The public’s right of access is as vulnerable as its need for Housing Court records is powerful, and we commend the Court for including First Amendment requirements in the Proposed Rule.⁷ To that end, we provide modest suggestions in an annotated copy of the Proposed Rule, explain them in the memorandum below, and ask only that the Court bear two principles in mind:

- (1) Public access ultimately serves the very interests that cause tenants to seek secrecy; and
- (2) When they do, the Court must stand sentinel for the public’s right to information needed to solve the endemic problems tenants face, and keep future tenants from harm.

As proponents of judicial transparency, we are grateful for your inclusive rulemaking, and your consideration of the public’s right of access to court records. As Cleveland residents, we applaud your proven commitment to ensuring that the Housing Court does not merely adjudicate cases, but serves justice for vulnerable members of our community. And as members of a law-school community that seeks to “learn law, live justice,” we are indebted to the example you provide. Please let us know if we can be of any further assistance.

Respectfully submitted,

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⁶ See, e.g., *Grove Fresh v. Everfresh Juice*, 24 F.3d 893, 899 (7th Cir. 1994) (“In such instances, the litigants’ purported interest in confidentiality must be scrutinized heavily.”); *Procter & Gamble v. Bankers Trust*, 78 F.3d 219, 227 (6th Cir. 1996) (court must not “abdicate its responsibility” to “determine whether filings should be made available to the public,” or “turn this function over to the parties”).

⁷ E.g., Proposed Rule, L.R. 6.13(A) (“clear and convincing evidence, that the public’s presumptive right of access to the information is overcome by a compelling governmental interest

⁸ The views expressed in this submission are those of its signatories, and do not necessarily reflect the views of Cleveland State University or the Cleveland-Marshall College of Law.

MEMORANDUM

Until recently, we simply didn't know how immense this problem was, or how serious the consequences, unless we had suffered them ourselves. For years, social scientists, journalists, and policymakers all but ignored eviction, making it one of the least studied processes affecting the lives of poor families. But new data and methods have allowed us to measure the prevalence of eviction and document its effects.

— Matthew Desmond, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY*

This rulemaking can eliminate a major obstacle to solving the eviction crisis in Cleveland, set a badly needed national example for calibrating public access to eviction records, and ensure that the information necessary to expose, understand, and prevent tenants' problems can do its work.

This Court's leadership is vital, as Matthew Desmond recognized in his Pulitzer Prize-winning study of how evictions perpetuate the cycle of poverty and blight. Desmond cited this Court's roiling docket to highlight the stakes of his influential warning: the eviction crisis poses the greatest policy threat to American cities, but is the least understood.⁹ Experts agree:

- “Varying laws in different jurisdictions and sealed court records” are a chief obstacle to solving the eviction crisis.¹⁰
- The problem remains “colossal.”¹¹
- “The issue for folks in the field is that there's no information.”¹²

The stakes for tenants are grave. Cleveland reels from the foreclosure crisis, and residential instability disproportionately affects its most vulnerable, shredding the social fabric necessary for struggling communities to regain their footing. Exonerated tenants worry that records identifying them by name may impair lease applications, for unlike other states, Ohio has no law forbidding landlords from considering failed eviction actions.

But the public's stake in access to Housing Court records is no less tangible, and no less vulnerable. To take just one recent example, an eviction action earlier this year prompted Cleveland Councilman Tony Brancatelli to investigate a noncompliant landlord with “multiple properties throughout the neighborhood,” and collaborate with the Legal Aid Society to prepare right-to-counsel legislation to aid tenants as early as next year.¹³

⁹ Desmond, *EVICTED*, *epilogue* (in 2012, this Court docketed one action per nine Cleveland households).

¹⁰ Emily Peiffer, *How national data can help tackle the eviction crisis* (THE URBAN INSTITUTE, April 19, 2018), <https://www.urban.org/urban-wire/how-national-data-can-help-tackle-eviction-crisis> (the eviction crisis has “long been rooted in anecdotal and city-specific information because of a lack of national eviction data”).

¹¹ *Id.* (quoting Desmond, whose new Eviction Lab launched an unprecedented national database “to fill those data gaps and provide local governments with information that can help them combat the eviction crisis.”).

¹² *Id.* (quoting the director of data analysis for the Legal Services Corporation: “they’re working in a vacuum.”).

¹³ Joe Pagonakis, *Cleveland tenants want more legal help in eviction cases* (ABC NEWS 5, Sep. 22, 2018), <https://www.news5cleveland.com/homepage-showcase/cleveland-tenants-want-more-legal-help-in-eviction-cases>

Yet Cleveland journalists face data gaps that perpetuate the city’s “invisible housing crisis.”¹⁴ Cleveland urban-affairs scholars emphasize that even ample data cannot provide the “complete picture of eviction in a particular area” policy solutions require, and that policymakers must understand “the qualitative impact those evictions have on renters’ lives.”¹⁵

Only court records can fully expose the root causes and social cost of failed eviction actions. Only court records can direct public attention to malfeasance, corruption and discrimination in Cleveland’s beleaguered tenancies, and the inadequate funding for affordable housing and legal services available to Cleveland tenants as they are sued and displaced. Their problems urgently need informed public and policy attention, but the facts necessary to solve them can be held hostage by tenants who might, understandably, prioritize their personal concerns over the larger public’s right—and need—to understand their ordeals.¹⁶ After all, the public, with its paper rights and theoretical interests, does not appear. The “structural role” public access plays in solving their problems provides little immediate comfort to tenants who are unrepresented by counsel to articulate their interests, or adduce sufficient proof to strike their names from records.

Only the Court, by imposing First Amendment standards, can protect those larger interests. Eschewing categorical rules, the First Amendment requires parties to prove that specific information threatens a “substantial probability” of harm to a “compelling governmental interest” by “clear and convincing evidence.”¹⁷ It does not permit parties to seal information without process, or quash access by consent; but requires the Court to make specific, on-the-record findings under strict standards *before* sealing records.¹⁸

(quoting Legal Aid Supervising Attorney Hazel Remesch: “only one to two percent of tenants are walking into court with an attorney. . . . it can mean keeping a house over your head versus homelessness.”).

¹⁴ See, e.g., Vince Grzegorek, *There Are an Average of 12 Evictions Every Day in Cleveland: New Data Puts Numbers Behind America’s ‘Invisible Housing Crisis’* (CLEVELAND SCENE, Apr. 26, 2018), <https://www.clevescene.com/scene-and-heard/archives/2018/04/26/there-are-an-average-of-12-evictions-every-day-in-cleveland-new-data-puts-numbers-behind-americas-invisible-housing-crisis>.

¹⁵ *Id.* (quoting Megan Hatch, Assistant Professor of Urban Policy at CSU’s Levin College of Urban Affairs).

¹⁶ *Brown & Williamson v. F.T.C.*, 710 F.2d 1165, 1178 (6th Cir. 1983) (“The resolution of private disputes frequently involves issues and remedies affecting third parties or the general public. The community catharsis, which can only occur if the public can watch and participate, is also necessary in civil cases. Civil cases frequently involve issues crucial to the public—for example, discrimination, voting rights, antitrust issues, government regulation, bankruptcy, etc.”).

¹⁷ *Press-Enterprise v. Sup. Ct.*, 464 U.S. 501, 510 (1984) (“*Press-Enterprise I*”); *Press-Enterprise v. Sup. Ct.*, 478 U.S. 1, 13-14 (1986) (“*Press Enterprise II*”); see also *State ex rel. Beacon Journal v. Bond*, 2002-Ohio-7117, ¶¶ 21-26, 98 Ohio St. 3d 146, 153, 781 N.E.2d 180, 189 (incorporating *Press-Enterprise* burdens and standards, unsealing *voir dire* transcripts and juror questionnaires, and rejecting categorical rules for sealing responses where trial court “neither articulated particularized findings regarding the privacy interests of jurors nor considered alternatives to the total suppression of the questionnaires,” but instead “denied access to all 290 questionnaires without limiting its order to the personal information that jurors have legitimate reasons for keeping out of the public domain.”).

¹⁸ *Bond*, 2002-Ohio-7117, ¶¶ 22 & 26. We emphasize that though Ohio’s Superintendence Rules derive their requirements from the First Amendment’s, they do not replace them. They are promulgated under Article IV, Section 5 of the Ohio Constitution, see Sup. R. 1(B), which makes clear that they cannot “abridge, enlarge, or modify any substantive right,” and subordinates their provisions to constitutional rights Ohio courts must enforce under the Supremacy Clause and the First and Fourteenth Amendments. See, e.g., *id.* ¶ 46; *State ex rel. Thompson*

These requirements are vital in the context of Housing Court records, because failing to tailor sealing practices to constitutional limits perpetuates the public ignorance that precludes systemic reform. We therefore support the most important feature of the Proposed Rule—its implicit incorporation of First Amendment standards—and provide suggestions in three sections below:

First, we applaud the Proposed Rule for incorporating two key procedural requirements: (1) that no court records may be lawfully sealed without formal process and judicial findings in advance, and (2) that parties seeking restrictions on public access must justify them against the public’s interest. Without these requirements, the “presumption” of public access is meaningless, and they are the most vulnerable aspect of the public’s First Amendment right. We therefore recommend incorporating them explicitly, and suggest how they inform practical issues like docketing and electronic access.

Second, we recommend the Proposed Rule’s explicit incorporation of constitutional standards. As a general matter, we emphasize that categorical rules can produce unconstitutional results in application but evade review, and litigants who assert the public’s expensive rights are rare. So we offer suggestions to focus the Proposed Rule on constitutionally sufficient state interests, and ensure that categorically restricting information creates minimal risk of constitutional error.

Third, we caution against relying on rarely-tested categorical rules from other jurisdictions as proof of their constitutional adequacy. The cross-jurisdictional inconsistency Professor Desmond bemoans reflects a simple reality: it takes a well-heeled and motivated litigant to challenge even a demonstrably unconstitutional rule, and most have simply never been tested. Moreover, as the Ohio Supreme Court has explained, even compliance with the language of facially constitutional sealing rules can produce unconstitutional results as-applied. We therefore recommend particular care in narrowly tailoring the categorical provisions of the Proposed Rule, and offer two suggestions: (1) a clear definition of the information subject to categorical sealing, and (2) temporal limitations ensuring that as sealing interests wane, public access is restored.

The Court knows the stakes for this rulemaking better than anyone in Cleveland. But the fact that only the Court can fully see the problems its docket reveals is a key obstacle to solving them. Fortunately, this Court need not reinvent the wheel. By fully incorporating First Amendment requirements, the Proposed Rule will support lasting solutions for Cleveland tenants.

Newspapers, Inc. v. Unger, 28 Ohio St.3d 418, 420 (1986); *Press-Enterprise I*, 464 U.S. at 510; *Press-Enterprise II*, 478 U.S. at 13-14. Indeed, under First Amendment standards, several of these—including business interests in proprietary information, and personal interests in reputation—do not suffice to justify sealing. *Procter & Gamble*, 78 F.3d at 225 (“commercial self-interest” is not “grounds for keeping the information under seal.”).

I. BURDENS & PROCEDURES

As the Proposed Rule implicitly recognizes, the public's First Amendment right of access applies to Housing Court records, supplying mandatory procedures and standards for sealing records.¹⁹ We emphasize three critical procedural requirements:

Burden. The public need not justify access. Its right presumptively prevails, and the *proponent* bears the burden to justify restrictions by “clear and convincing evidence,” so that courts may make on-the-record findings before imposing any restriction.²⁰

Specificity. This burden must be borne for particular information. “Blanket” sealing orders are improper because they do not allow specific findings or redaction.²¹ As the Ohio Supreme Court has warned, categorical sealing rules necessarily threaten unconstitutional results, however facially lawful or well-defined their terms.²²

Process. The First Amendment forbids automatic sealing, because the public's right is presumptive and immediate, and even “minimal delay” harms “the value of ‘openness’ itself . . . whatever provision is made for later public disclosure.”²³ *Before* restricting access, therefore, courts must afford the public an opportunity to be heard,²⁴ and make on-the record findings that the public's right is overcome by a valid interest under proven facts.²⁵

¹⁹ Ohio Rev. Code § 1901.01 (A) (establishing Cleveland municipal court); Cleveland Mun. Ct. Rules, L.R. 1.01 (authorizing Municipal Court rulemaking under ORC § 1901); *Id.*, L. R. 1.04 (delegating Housing Division rulemaking to presiding judge). Compare *State ex rel. Beacon Journal v. Donaldson*, 63 Ohio St. 3d 173, 174 (1992) (requiring municipal court to apply constitutional standards) and *State ex rel. Cincinnati Enquirer v. Heath*, 2009-Ohio-590, 121 Ohio St. 3d 165 (remanding sealing dispute to municipal court for constitutionally adequate findings) with *In re T.R.*, 52 Ohio St. 3d 6, 18 (1990) (permitting broader balancing of sealing interests in juvenile-delinquency proceedings because the public's First Amendment access right did not traditionally apply) and *State ex rel. Scripps Howard v. Cuyahoga Cty. Ct. Cmn. Pleas, Juv. Div.*, 73 Ohio St. 3d 19, 21 (1995) (civil contempt proceedings arising from delinquency proceedings are subject to First Amendment standards).

²⁰ See, e.g., *Press-Enterprise II*, 478 U.S. at 15; *State ex rel. Thompson Newspapers v. Unger*, 28 Ohio St. 3d 418, 421 (1986); *State v. Washington*, 142 Ohio App. 3d 268, 271-272 (8th Dist. 2001) (“the burden is on the party seeking closure to establish the existence of a substantial probability of prejudice”).

²¹ *Scripps Howard*, 73 Ohio St.3d 19, 20 (citing *Press Enterprise II*); *Thompson Newspapers*, 28 Ohio St.3d at 425; *In re NBC*, 828 F.2d 340, 345 (6th Cir. 1987); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695-96 (6th Cir. 2002); see also *Brown & Williamson*, 710 F.2d 1165 at 1177 (6th Cir. 1983) (vacating sealing order where court “placed a seal on *all* of the documents . . . without discussion.”).

²² *Bond*, 2002-Ohio-7117, ¶ 26. See also Sections II (narrow tailoring) & III (categorical rules), *infra*.

²³ *In re Charlotte Observer*, 882 F.2d 850, 856 (4th Cir. 1989) (it is a “misapprehension and undervaluation of the core first amendment value at stake” to delay access); *In re Providence Journal*, 293 F.3d 1, 12–13 (1st Cir. 2002) (court's refusal to docket records “when tendered” to Clerk's office “violates the First Amendment”); *Grove Fresh*, 24 F.3d at 897 (“The newsworthiness of a particular story is often fleeting. To delay . . . disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression.”).

²⁴ *Globe Newspaper v. Sup. Ct.*, 457 U.S. 596, 609 n. 24 (1982); *Thompson Newspapers*, 28 Ohio St. 3d at 421.

²⁵ *Thompson Newspapers*, 28 Ohio St. 3d at 421; *Scripps*, 73 Ohio St. 3d at 22 (court “did not make the requisite findings.”); *State ex rel. Cincinnati Enquirer v. Bronson*, 2010-Ohio-5315, ¶ 15, 191 Ohio App. 3d 160 (12th Dist.)

We therefore suggest addressing the following considerations in the Proposed Rule:

- (a) Burden & Findings.** Clarifying Section (A) to ensure that the burden of sealing records rests with the movant, who must identify the particular information to be sealed, and provide that the Court must make on-the-record findings before restricting public access.
- (b) Notice, Hearing, & Docketing.** Clarifying Section (C) to expressly incorporate the Court's duty to notify the public in advance, and afford an opportunity to oppose sealing. In this connection, we emphasize the vital importance of meaningful access to docket information, without which "the public's right of access would be merely theoretical."²⁶ We therefore recommend that the Court adopt practical measures that ensure that the public can locate cases containing sealed information on the docket, even if the names of the parties have been lawfully redacted, so that its ability to later seek unsealing is not eviscerated in practice.
- (c) Electronic Access.** We emphasize the importance of providing electronic access to docket information and court records, for access by other means does not excuse limitations on public access,²⁷ and if sealing itself cannot be justified because the public's interest prevails, creating further, practical impediments to public access is improper.²⁸

II. INTERESTS & STANDARDS

The foregoing burdens ease the Court's task. Proponents of sealing must make the Court's decision clear under well-settled standards, and if speculation is required, or serious doubt remains, the public's right prevails.²⁹

("Requiring a hearing and findings on the record . . . affords the media and all interested parties an opportunity to be heard . . . so that the trial court is fully informed before making its decision.").

²⁶ *Hartford Courant v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004).

²⁷ *U.S. v. Beckham*, 789 F.2d 401, 412 (6th Cir. 1986); *see also U.S. v. Myers*, 635 F.2d 945, 952 (2d Cir. 1980) (public disclosure renders sealing futile and precludes requisite showing of valid interest in further restriction).

²⁸ *See, e.g., U.S. v. Hardy*, 2011 WL 1877671 (W.D. Pa. May 16, 2011) (limiting electronic access to documents would "impose a dramatic restriction on access"); *U.S. v. Index Newspapers LLC*, 766 F.3d 1072, 1092 (9th Cir. 2014) (electronic index); *Coleman v. County of Suffolk*, 174 F. Supp. 3d 747, 753-759 (E.D.N.Y. March 31, 2016) (ordering briefs filed on court's electronic docket; unsealing electronic records); *Emess Capital v. Rothstein*, 841 F. Supp. 2d 1251, 1257 (S.D. Fla. 2012) (ordering clerk to unseal documents on electronic docket); *Duckworth v. St. Louis Metro. Police. Dept.*, 654 Fed. App'x 249, 250 (8th Cir. 2016) (affirming denial of motion to remove electronic docket "from PACER and the Internet"); *U.S. v. MasMarques*, 2015 WL 5609957, at *3 (D. Mass. Sept. 22, 2015) (denying motion to seal records "publicly accessible through the court's PACER system"). To do so would also complicate doctrines that deal with the use of electronically docketed information in collateral litigations. *See State ex rel. Ohio Republican Party v. Fitzgerald*, 145 Ohio St.3d 92, 95, 2015-Ohio-5056 (courts properly notice information posted on a government website); *State ex rel. Everhart v. McIntosh*, 2007-Ohio-4798, ¶ 8, 115 Ohio St. 3d 195, 197 (courts properly notice public court records available on the Internet).

²⁹ *See, e.g., Bond*, 2002-Ohio-7117, ¶ 30.

These constitutional standards are appropriately high. By safeguarding the integrity of public decisionmaking, the First Amendment right of access holds “specific structural significance,”³⁰ because “[t]he resolution of private disputes frequently involves issues and remedies affecting third parties or the general public,”³¹ and though “individual cases turn upon the controversies between parties, or involve particular prosecutions, court rulings impose official and practical consequences upon members of society at large.”³²

The public’s right therefore presumptively overcomes even rights of constitutional magnitude, like a criminal defendant’s Sixth Amendment right to a fair trial.³³ Even sensitive interests like the identities of underage sex-crime victims cannot justify categorical sealing.³⁴ Reputational and commercial interests, however significant, simply do not bear adequate constitutional weight to overcome the public’s First Amendment right of access to court records.³⁵

Nonetheless, particular tenants may be able to adduce valid governmental interests. Certain aspects of personal privacy deemed “implicit in the concept of ordered liberty” can receive constitutional protection,³⁶ and privacy-proximate interests in marriage, procreation, contraception, family relationships, child rearing or education may be implicated by particular Housing Court cases.³⁷ But, as always, they must be demonstrated by particular tenants, not assumed conclusively by rule, and any rules that seek to approximate them must be narrowly drawn to avoid constitutional error.

³⁰ *Richmond Newspapers*, 488 U.S. at 593–94 (Brennan, J., concurring) (“the trial process serves other, broadly political, interests, and public access advances these objectives as well.”).

³¹ *Brown & Williamson v. F.T.C.*, 710 F.2d 1165, 1178 (6th Cir. 1983) (“The community catharsis, which can only occur if the public can watch and participate, is also necessary,” and “Civil cases frequently involve issues crucial to the public—for example, discrimination, voting rights, antitrust issues, government regulation, bankruptcy, etc.”).

³² *Richmond Newspapers*, 448 U.S. at 595 (Brennan, J., concurring).

³³ “The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [a fair trial].” *Toledo Blade*, 125 Ohio St. 3d at 158 (quoting *Press-Enterprise II*). “Any limitation must be ‘narrowly tailored to serve that interest.’” *Press-Enterprise I*, 464 U.S. at 510.

³⁴ *Globe*, 457 U.S. at 607–08 (“[S]afeguarding the physical and psychological well-being of a minor” is a compelling interest, but “as compelling as that interest is, it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim.”).

³⁵ *Proctor & Gamble*, 78 F.3d at 225 (“The private litigants’ interest in protecting their vanity or their commercial self-interest simply does not qualify”).

³⁶ *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (explaining that “the right has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education.”). To any extent that these privacy-proximate interests are implicated in particular cases, they must be asserted by tenants, not assumed by rule.

³⁷ See *U.D. Registry, Inc. v. State of California*, 34 Cal. App. 4th 107, 114 (Cal. Ct. App. 1995) (“Concern about the availability of rental housing for those needing housing, and particularly those facing eviction, is a valid and significant state interest.”); see also *Com. v. Pon*, 14 N.E.3d 182, 199 (Mass. 2014) (“there is now a fully articulated governmental interest in shielding criminal history information from these decision makers where so doing would not cause adverse consequences to the community at large.”).

For once identified and invoked, a valid interest in sealing must then be shown to *overcome* the public’s presumptive First Amendment right of access. Here too, the standards are high, and even a *likelihood* or *probability* of harm to a valid interest cannot justify sealing. Rather, the Court must find a “*substantial probability* of harm” proven by “clear and convincing *evidence*,” and ensure that the following four factors are met before restricting access:

Proven Threat to Compelling Interest. A “substantial probability of harm” to a “compelling government interest.”³⁸

No Alternative. No alternative short of restricting public access that can adequately protect that interest.³⁹

Narrow Tailoring. No broader restrictions than necessary: if a more narrowly tailored restriction exists, like redaction, it must be employed.⁴⁰

Effective. No futile restrictions: sealing already-public information cannot be justified.⁴¹

We therefore suggest incorporating the following considerations in the Proposed Rule:

- (a) **Valid Interest.** Clarifying Section (A) to ensure that movants identify and prove danger to a compelling governmental interest of sufficient constitutional magnitude. We accept that a tenant’s constitutional privacy interests could be affected if she cannot obtain housing, so we suggest language that focuses categorical sealing on circumstances where harm can be shown to constitutionally cognizable privacy interests.
- (b) **Substantial Probability of Harm.** Clarifying Section (A) to incorporate this mandatory evidentiary standard, because conclusory invocations of even valid interests are always insufficient to justify sealing,⁴² and “compelling evidence” must show a “substantial probability” of harm.
- (c) **Court Decides.** Clarifying Sections (A) and (C) to excise any suggestion that an agreement between parties can satisfy a movant’s burden to justify sealing.⁴³

³⁸ See, e.g., *Richmond Newspapers*, 448 U.S. at 580-81 (plurality opinion of Burger, C.J.); *Press-Enterprise I*, 464 U.S. at 510; *Press-Enterprise II*, 478 U.S. at 13-14; *Beacon Journal*, 98 Ohio St. 3d at 152 (2002).

³⁹ *Press-Enterprise II*, 478 U.S. at 13-14; *Beacon Journal*, 98 Ohio St. 3d at 155 (court must make “specific findings of prejudice [and] consider[] less restrictive alternatives”); *State ex Rel. WFMJ v. Bannon*, No. 84 C.A. 20, 1984 WL 7678, at *7 (Ohio App. 7th Dist. Mar. 14, 1984) (“The trial court should consider all alternatives”); see also *In re The Herald*, 734 F.2d 93, 100 (2d Cir. 1984) (A “trial judge must consider alternatives and reach a reasoned conclusion that closure is a preferable course to follow to safeguard the interests at issue.”).

⁴⁰ *Richmond Newspapers*, 448 U.S. at 581; *Press-Enterprise II*, 478 U.S. at 14; *Press-Enterprise I*, 464 U.S. at 510-11; *Thompson Newspapers*, 28 Ohio St. 3d at 425; see also *U.S. v. Biaggi*, 828 F.2d 110, 116 (2d Cir. 1987) (rejecting “wholesale sealing” where “limited redaction [might] be appropriate”).

⁴¹ *Press-Enterprise II*, 478 U.S. at 14 (requiring demonstration “that closure would prevent” alleged harm); *Beacon Journal*, 98 Ohio St. 3d at 155 (citing *Press-Enterprise II*); *AP v. U.S. Dist. Ct.*, 705 F.2d 1143, 1146 (9th Cir. 1983) (“there must be ‘a substantial probability that closure will be effective in protecting against the perceived harm’”).

⁴² *Toledo Blade*, 125 Ohio St. 3d at 158 (quoting *Press-Enterprise Co. v. Sup. Ct. of Cal.*, 478 U.S. 1, 15 (1986)).

⁴³ *Brown & Williamson*, 710 F.2d at 1180 (parties’ confidentiality agreement “does not bind the court in any way.”)

III. SCOPE, TIME, & EXPUNGEMENT

Categorical rules always threaten constitutional error, because they preclude specific factfinding, and prevent case-specific balancing of public and private interests.⁴⁴ As the Ohio Supreme Court explained in *Bond*, even narrow *per se* rules cannot guarantee constitutional application.⁴⁵ And as the U.S. Supreme Court emphasized in *Globe Newspapers*, where it invalidated a state statute that categorically limited public access to information about underage victims in sex-crime cases, even compelling interests cannot justify categorical sealing where “it is clear that the circumstances of the particular case may affect the significance of the interest,” and explained that courts should make determinations “on a case-by-case basis.”⁴⁶

We are aware of court rules in other jurisdictions that provide categorical rules under similar circumstances, but caution against assuming the constitutionality of rules with facial constitutional defects that have never been challenged,⁴⁷ or the adequacy of rules that approximate First Amendment requirements without providing fulsome guidance.⁴⁸ Indeed, access restrictions “often evade review” because they “usually expire[] before an appellate court

⁴⁴ “[T]he particular interest, and threat to that interest, must ‘be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.’” *Press–Enterprise I*, 464 U.S. at 510; *Beacon Journal*, 98 Ohio St. 3d at 155 (courts must make “specific findings of prejudice [and] consideration of less restrictive alternatives”).

⁴⁵ *Bond*, 2002-Ohio-7117, ¶ 26 (permitting categorical redactions of Social Security, telephone, and driver’s license numbers from jury questionnaire responses, but acknowledging that those redactions would be unconstitutional under certain circumstances, and directing courts “to make no such promise of confidentiality, but instead conspicuously advise prospective jurors in writing that, notwithstanding the per se exceptions listed herein, their responses may be subject to public disclosure.”).

⁴⁶ *Globe*, 457 U.S. at 607–08.

⁴⁷ E.g., Cal. Civ. Proc. Code § 1161.2 (reversing constitutional burden of proof; presumptively imposing blanket sealing of Housing Court dockets and requiring reporters to demonstrate “good cause” to access records). Indeed, as a federal court complained, this rule left it unable to determine its jurisdiction in a federal lawsuit, for it was “unable to ascertain the status of alleged unlawful detainer proceedings through a search of public dockets.” *Asturias v. Nationstar Mortg., LLC*, 2015 WL 6602022, at *2 n.3 (N.D. Cal. Oct. 30, 2015). The constitutionality of this rule has never been tested, but one tenant-screening company sought exemption from its operation by emphasizing its legislative history, which reflects that *landlords* supported the sealing provisions to prevent tenant-advocacy groups from finding plaintiffs to bring unlawful-action litigations against landlords. *U.D. Registry, Inc. v. Mun. Court*, 50 Cal. App. 4th 671, 674 (Cal. Ct. App. 1996).

⁴⁸ An Illinois statute permits the discretionary sealing of eviction records if a movant’s “interests are not outweighed by the public’s interest in knowing about the record.” 735 Ill. Comp. Stat. 5/9-121. It has never been constitutionally tested, and the sole reported decisions denied an application to seal records, and affirmed that denial. *Habitat v. Peebles*, 2018 IL App (1st) 171420, ¶ 5 (Ill. Ct. App. 2018). Minnesota enacted a nearly identical “expungement” rule, Minn. Stat. § 484.014; which has also never been constitutionally challenged. The only reported decisions affirmed a denial of a sealing motion and reversed a decision to deny review of a sealing order. *Pondview Townhomes v. Hunter*, 2018 WL 1462339, at *1 (Minn. Ct. App. Mar. 26, 2018), review denied (May 29, 2018) (“Because the district court concluded that the public’s interest outweighs the private interest at stake, it properly applied the law and did not abuse its discretion in denying Hunter’s expungement motion.”); *Sela Investments Ltd. v. H.E.*, 909 N.W.2d 344, 350 (Minn. Ct. App. 2018) (remanding for review of sealing decision). Nevada’s recently enacted statute imposes an automatic and blanket seal on dismissed eviction actions, flatly violating nearly every controlling First Amendment requirement, and has never been challenged constitutionally or otherwise in any reported decision. Nev. Rev. Stat. § 40.2545.

can consider [them],”⁴⁹ and because practical pressures often produce resolutions where none of the parties wish to challenge sealing, even obviously unconstitutional features of these rules are unlikely to be tested.

More fundamentally, these are simply bad rules. They represent the very problem Desmond and other thought leaders blame for attenuating the eviction crisis—overbroad and inconsistent rules permitting court records to be sealed. The broad, unchallenged categories those jurisdictions reflect a disregard for a vital precondition for solving the eviction crisis, and a risk tolerance for constitutional error that we urge the Court to reject, for “the First Amendment should never countenance the gamble that informed scrutiny of the workings of government will be left to wither on the vine.”⁵⁰ This Court can and should do better to limit the risk of public harm.

We therefore emphasize two important aspects of narrow tailoring: that any restrictions must be limited to the interest they protect in *scope* and *time*. As to the former, definitions are particularly critical in tailoring categorical rules to a valid interest, because automatic, docket-wide “blanket” sealing cannot ensure “any limitation must be ‘narrowly tailored to serve that interest,’”⁵¹ or address circumstances where the public’s interest is too strong to be overcome. And as to the latter, time is particularly vital. Delays are just as harmful as outright sealing, because they prevent time-sensitive reporting that might spur public attention.⁵² And the passage of time, by contrast, weakens, not enhances, valid governmental interests in keeping records from the public.

Finally, we emphasize the danger of importing criminal-expungement provisions in the context of a civil-action sealing rule. Doing so conflates the state interest that justifies criminal expungement statutes (“providing a second chance to criminal defendants who have been found not guilty”) with the civil interests presented by Housing Court records (helping tenants conceal civil eviction actions from prospective landlords).⁵³ Even if the civil interests could reach constitutional magnitude, they would do so with varying degrees of strength in particular cases, without consideration of whether that strength suffices to overcome the public’s right of access.

⁴⁹ *Donaldson*, 63 Ohio St.3d at 175 (citing *Globe*, 457 U.S. at 602-603).

⁵⁰ *Andrew v. Clark*, 561 F.3d 261, 273 (4th Cir. 2009).

⁵¹ *Press-Enterprise II*, 478 U.S. at 15; *Press-Enterprise I*, 464 U.S. at 510.

⁵² *Grove Fresh*, 24 F.3d at 897 (“To delay . . . disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression.”). *State ex rel. Toledo Blade Co. v. Henry Cty. Court of Common Pleas*, 125 Ohio St.3d 149, 158 (2010) (“the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly.”) (quoting *Nebraska Press v. Stuart*, 427 U.S. 539, 561 (1976)).

⁵³ *State ex rel. Cincinnati Enquirer v. Winkler*, 2004-Ohio-1581, ¶¶ 10-12, 101 Ohio St. 3d 382, 384. In a since-superseded case, the Ohio Supreme Court recognized that non-statutory expungement may derive from “the constitutional right to privacy,” but explained that such circumstances are narrow and rare: “Typically, the public interest in retaining records of criminal proceedings, and making them available for legitimate purposes, outweighs any privacy interest the defendant may assert.” *Pepper Pike v. Doe*, 66 Ohio St. 2d 374, 377 (1981). Both the nature and strength of even that interest are markedly different, and may not be implicated at all in particular cases. See *State v. Harrison*, 2018-Ohio-1724, ¶ 18 (2d Dist. May 14, 2018) (“In the absence of a showing that appellant’s interest in having his criminal record sealed was equal to or greater than the government’s interest in maintaining such records, we cannot say that the trial court abused its discretion in denying Harrison’s application.”).

Moreover, even in the criminal context, expungement provisions reject the assumption that dismissal alone overcomes the public's interest. One Ohio court recently affirmed the denial of an expungement motion that relied on "the denial of [the expungement petitioner's] housing application" as an improperly speculative basis to expunge an acquitted defendant's records, noting that the housing denial might have been caused by other factors, and emphasizing that "it was not unreasonable for the trial court to put transparency and the government's awareness of the charges above [the petitioner's] personal interests."⁵⁴

So too here. The public's interest in a failed eviction action will not always be outweighed by the interest of the prevailing tenant. Indeed, the fact that it was brought, and the vulnerability of a particular tenant, might be vital to exposing a serious problem. And mere disclosure of the failed action will not always not create a "substantial probability" of harm to a tenant's valid interest, whether because of widespread public exoneration, because the tenant is a criminal recidivist or otherwise have far more obvious difficulties in obtaining housing, or because the tenant presents none of the privacy-proximate interests in child-rearing or education that would elevate her concerns beyond a commercial preference for particularly affordable or desirable housing.

In any event, the legislature omitted civil defendants' interests from Ohio's expungement statute, and declined to expand expungement to civil actions. Tenants' interests were not before the Ohio Supreme Court when it addressed the expungement statute's facial constitutionality, and the statute only survived a constitutional challenge as-applied because the criminal defendant's trial had been public, high-profile, and widely reported.⁵⁵ Thus, even if the interests were identical and categorically afforded equal weight, there is little likelihood that many, much less most, Housing Court actions will become front page news, further risking constitutional error.

This risk is heightened by the "inherent lack of precision in the term 'expungement.'"⁵⁶ Tenants can still request lawful *sealing* of information, but "expungement" has meanings with little bearing outside the criminal context, and requiring tenants to identify particular records for redaction is a small price to pay if sealing is appropriate. But the blanket sealing of entire housing-court cases cannot be justified in the civil-litigation context under the First Amendment.

We therefore suggest incorporating the following considerations in the Proposed Rule:

- (a) **Scope.** Providing a clear definition for the information within the scope of the Proposed Rule in Section (A). "Eviction record" is not defined, and does not differentiate between different types of court records that may qualify, including such vital (and rarely-sealed)

⁵⁴ *Harrison*, 2018-Ohio-1724, ¶ 18.

⁵⁵ *Winkler*, 2004-Ohio-1581, ¶¶ 10-12.

⁵⁶ *Pepper Pike*, 66 Ohio St. 2d 374 at 377 (explaining that "expungement" has special meaning only with respect to criminal proceedings); *c.f. State v. Radcliff*, 2015-Ohio-235, ¶ 16, 142 Ohio St. 3d 78, 82, 28 N.E.3d 69, 73 (using seal or expunge" repeatedly and interchangeably").

records as complaints and Court orders.⁵⁷ It would also permit the sealing of an entire document, rather than directing limited redactions consistent with proven interests, so we suggest limiting the scope of categorical sealing to the tenants' names.⁵⁸

- (b) Time.** Clarifying Section (A) to reflect the weakening of the governmental interest in ensuring access to housing after a tenant has obtained housing for five years, and supplement Section (D) to impose presumptive sunrise dates for public access.
- (c) Expungement.** Clarifying Section (D) to prevent conflating state interests in criminal expungement with civil housing interests, and require movants to identify the records they wish sealed.

⁵⁷ The “sealing of court opinions is too rare to be mentioned,” *In re Sealing*, 562 F.Supp.2d 876, n.32 (S.D. Tex. 2008). It “makes the ensuing decision look more like fiat and requires rigorous justification.” *Hicklin v. Bartell*, 439 F.3d 346, 348-49 (7th Cir. 2006) (“We hope never to encounter another sealed opinion.”). Access to complaints is also fundamental. *See, e.g., In re Nvidia*, 2008 WL 1859067, at *3 (N.D. Cal. Apr. 23, 2008) (“When a plaintiff invokes the Court’s authority by filing a complaint, the public has a right to know who is invoking it, and towards what purpose, and in what manner.”); *McCrary v. Elations*, 2014 WL 1779243, at *6 (C.D. Cal. Jan. 13, 2014) (complaints are central to “the public’s understanding of the judicial process and of significant public events”).

⁵⁸ Though other information might identify a tenant, or meet constitutional standards in particular cases, an exception threatens to swallow the rule, and particular information is better addressed directly than categorically.

(ANNOTATED) PROPOSED RULE

6.13 MOTION TO SEAL EVICTION RECORD

A. The Court may order the Clerk to ~~seal an eviction record~~redact designated information from a Housing Court record⁵⁹ ~~when justice so requires after finding on-the-record, by clear and convincing evidence, that the public's interest is outweighed by a substantial probability of harm~~⁶⁰ to a compelling governmental interest, including housing-related privacy interests in family relationships, child rearing or education,⁶¹ ~~including in under~~ the following circumstances:

1. The landlord dismisses the claim for eviction before adjudication of the issue of possession;
2. The tenant prevails on the merits on the claim for possession; or
3. ~~The landlord consents to the Court sealing the record as part of an agreed settlement, or otherwise; or~~
4. ~~The landlord prevails on the merits on the claim for possession and all of the following occur:~~
 - a. ~~At least five years have passed since judgment for the landlord.~~
 - b. ~~At least five years have passed since the tenant has had an adverse judgment granting an eviction in any jurisdiction.~~⁶²
 - e. 3. The tenant has satisfied the monetary judgment—if any—in the case where the tenant seeks ~~to have the Court seal the eviction record sealing.~~⁶³

B. The party seeking redactions ~~to have the record sealed~~ must file a written motion and serve that motion upon the opposing party in the case.⁶⁴ The opposing party may file a response within the time specified by the Housing Div. Loc. R. 3.052, *supra*. All motion papers will be publicly and electronically docketed, and members of the public will be given a reasonable

⁵⁹ Limitations on public access must be narrowly tailored, and redactions must be used instead of sealing entire records. *See* Sections I(a) & III (a), *supra*. If the Court wishes to provide categorical rules for sealing information beyond individual names, we recommend formulating a narrowly-cabined definition of “specific information independently sufficient to identify the party” and emphasize the danger that parties can always draw attenuated causal lines between information in their case and their identities, without meeting the First Amendment’s “substantial likelihood of harm” standard.

⁶⁰ No limitations may be imposed on public access before the Court has made advance and on-the-record findings that the proponent of sealing has borne its burden. *See* Section I, *supra*.

⁶¹ Subject to concerns about categorical sealing provisions in light of the case-by-case burdens and balancing required by the First Amendment, FAME accepts that this requirement would limit the likelihood of constitutional error in the categorical decisionmaking contemplated by the Proposed Rule. *See* Section III, *supra*.

⁶² After five years, the tenant’s interim housing will have lessened the state interest in sealing. *See* Section III, *supra*.

⁶³ This suggestion conforms the Proposed Rule’s scope to the definitions suggested above, without implying that full records may be sealed where redactions suffice to protect proven interests. *See* Section II, *supra*.

⁶⁴ The movant bears the burden of establishing a valid governmental interest in limiting access to particular information, and this suggestion effects constitutional narrow-tailoring requirements. *See* Section II, *supra*. If the Court considers a more expansive scope of categorical sealing (i.e., beyond names), we recommend that it include language here that the movant “shall specifically identify the information sought to be sealed in that motion.”

opportunity to appear and oppose.⁶⁵ Either party may request an oral hearing on the motion, **which will be scheduled on the public docket in advance and open to public attendance.**⁶⁶

C. The Court **will presume the public's legitimate need for access to all information in its records,**⁶⁷ **and** may consider all relevant factors when examining a Motion to Seal Eviction Record, including:

1. ~~Whether the sealing of the record is agreed to by the opposing party or counsel;~~⁶⁸
2. Whether there are unusual and exceptional circumstances;
3. The disposition of the first cause of action (*i.e.*, which party prevailed; whether the matter was voluntarily dismissed);
4. ~~Whether the opposing party has filed an opposition memorandum. See Housing Div. Loc. R. 3.052, *supra*;~~⁶⁹
5. ~~Legitimate need of government to maintain a public record of the case; and~~⁷⁰
6. Any other information relevant to the totality of the circumstances.

D. If the Court grants a Motion to Seal Eviction Record, the Clerk shall forthwith cause the Tenant's name to be redacted from all public records it maintains, ~~including the electronic case index system,~~⁷¹ **for a period of five years, at which time the Clerk shall restore public and electronic access to unredacted records, to the same extent that it would for a criminal sealing of records (formerly known as expungement).**⁷²

⁶⁵ See Section I(b), *infra*.

⁶⁶ See Section I, *supra*.

⁶⁷ This suggestion clarifies that the First Amendment's presumption of public access is not just a consideration that may be balanced, but a legal presumption that the proponent of sealing must overcome. See Section I, *supra*.

⁶⁸ This suggestion clarifies that records cannot be sealed upon the agreement of the parties, and any such agreement is not probative of the public's independent and presumptive right of access. See Section II, *supra*.

⁶⁹ This suggestion clarifies that whether or not a party opposes sealing, the movant still bears the burden, and it is the Court's role to enforce the presumption of public access even where unopposed. See Section I, *supra*.

⁷⁰ This suggestion eliminates the reference to unrelated *prosecutorial* and *law-enforcement* interests at issue in the expungement context from which this language derives.

⁷¹ The Court must preserve sufficient docket information to ensure that if the interests in sealing wane, or the public interest in the issues presented wax, the public can locate the case and seek unsealing. See Sections I & III, *supra*.

⁷² The state interests in rehabilitating accused criminals are different from the state interests in sealing information about civil defendants. See Section III, *supra*.